

NTSB Order No. EA-5159

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 25th day of May, 2005

Respondent.

Docket SE-17348

¹ A copy of the initial decision, an excerpt from the hearing transcript, is attached.

discussed below, we grant the Administrator's appeal and affirm the emergency order of suspension insofar as it is consistent with this opinion and order.

The Administrator's Emergency Order

The Administrator's March 23, 2005, emergency order, which was filed as the complaint in this case, stated that the Eastern Regional Counsel's office was in receipt of an investigative report that indicated the following:

1. Darby Aviation ("Darby") is the holder of [an] Air Carrier Certificate ... authorizing operations under Parts 119 and 135 of the Federal Aviation Regulations (14 C.F.R. Parts 119 and 135).
2. At all times relevant herein, Darby's operations specifications authorized Darby to conduct operations under the business name of AlphaJet International ("AlphaJet").
3. On or about November 17, 2003, AlphaJet entered into an agreement with Platinum Jet Management ("Platinum"), entitled "Charter Management Agreement."
4. At all times relevant herein, Platinum did not hold an air carrier certificate under Part 119 and did not have operations specifications to operate under Part 135.
5. At all times relevant herein, Darby d/b/a AlphaJet's operations specifications and its manual did not list Platinum (or its agents, contractors, or employees) as authorized to exercise operational control.
6. By virtue of the Charter Management Agreement, from on or about November 17, 2003, to on or about February 2, 2005, Darby d/b/a AlphaJet caused, permitted, or allowed a scheme to exist by which Platinum unlawfully operated passenger-carrying flights for compensation or hire.
7. By virtue of that agreement, Darby d/b/a AlphaJet caused, permitted, or allowed Platinum to operate the

aircraft described above on passenger-carrying flights for compensation or hire when Platinum did not hold an Air Carrier Operating Certificate and appropriate operations specifications.

8. For example, on or about February 2, 2005, Darby d/b/a AlphaJet caused, permitted, or allowed Platinum to operate a Challenger 600 aircraft, identification number N370V, in a charter operation at Teterboro Airport, Teterboro, New Jersey. The aircraft crashed on takeoff.
9. In addition, Darby d/b/a AlphaJet caused, permitted, or allowed Platinum to operate the following passenger-carrying flights for compensation or hire:
 - a. On or about November 2, 2004, from Teterboro, New Jersey to Phoenix, Arizona.
 - b. On or about November 10, 2004, from Palm Beach Florida to Teterboro, New Jersey.
 - c. On or about November 12, 2004, from Teterboro, New Jersey to "MBPV".
 - d. On or about November 15, 2004, from MBPV to Wilmington, North Carolina and then from Wilmington to Teterboro, New Jersey.
 - e. On or about November 29, 2004, from Ft. Lauderdale, Florida to Boca Raton, Florida and then from Morristown, New Jersey to Teterboro, New Jersey to MBPV.
 - f. On or about December 21, 2004, from Portsmouth, New Hampshire to Coatesville, Pennsylvania and then from Coatesville to Palm Beach, Florida.
 - g. On or about December 25, 2004, from Morristown New Jersey to Boca Raton, Florida.
 - h. On or about December 28, 2004, from Nassau, Bahamas to Anguilla Island, Anguilla.
 - i. On or about January 2, 2005, from Teterboro, New Jersey to San Juan, Puerto Rico and then from San Juan to Anguilla Island, Anguilla, Anguilla Island to Wilmington, North Carolina, and Wilmington to Teterboro.
 - j. On or about January 10, 2005, from Ft. Lauderdale to Palm Beach, Florida, Palm Beach to El Paso,

Texas, and El Paso to Los Angeles, California.

- k. On or about January 11, 2005, from Los Angeles, California to Baton Rouge, Louisiana.
 - l. On or about January 16, 2005, from Ft. Lauderdale, Florida to Miami, Florida, and Miami to Los Angeles, California.
 - m. On or about January 19, 2005, from Los Angeles, California to Denver, Colorado.
 - n. On or about January 20, 2005, from Denver, Colorado to Ft. Lauderdale, Florida.
 - o. On or about January 30, 2005, from Ft. Lauderdale, Florida to Opa Locka, Florida, and Opa Locka to Las Vegas, Nevada.
 - p. On or about February 1, 2005, from Las Vegas, Nevada to Teterboro, New Jersey.
10. By virtue of the Charter Management Agreement, from on or about November 17, 2003 to on or about February 2, 2005, Darby d/b/a AlphaJet sold, assigned, transferred, and/or leased the privileges of its Air Carrier Operating Certificate to Platinum.
 11. By virtue of that agreement, Darby d/b/a AlphaJet failed to maintain responsibility for operational control of its flight operations.
 12. Specifically, from on or about November 17, 2003 to on or about February 2, 2005, for flights operated pursuant to the agreement between Darby d/b/a AlphaJet and Platinum:
 - a. Platinum provided the aircraft, a Challenger 600, identification number N370V.
 - b. Platinum maintained the aircraft.
 - c. Platinum provided and paid for its own maintenance personnel.
 - d. Platinum prepared and kept maintenance records.
 - e. Platinum employed and dispatched the flight crew, including pilots and flight attendants.
 - f. Platinum scheduled pilot and flight attendant training and maintained pilot and flight attendant

training records.

- g. Platinum conducted preemployment and random drug testing of pilots.
 - h. Platinum prepared and submitted TSA criminal history records checks for pilots and mechanics.
 - i. Platinum provided flight scheduling, including any charter.
 - j. Platinum paid AlphaJet a monthly "Part 135 certificate fee".
 - k. Platinum prepared and kept records of trip itinerary and flight manifests using a Platinum letterhead.
 - l. In addition, the agreement provides that Platinum received 90% of all charter revenues, with 10% received by AlphaJet.
13. By virtue of Darby d/b/a AlphaJet causing, permitting, or allowing Platinum to operate passenger-carrying flights for compensation or hire when Platinum did not hold an Air Carrier Certificate and appropriate operations specifications, and by virtue of Darby d/b/a AlphaJet failing to maintain responsibility for operational control of its flight operations, Darby d/b/a AlphaJet caused, permitted, or allowed Platinum to exercise operational control for passenger-carrying flights for compensation or hire when Platinum:
- a. Did not prepare and keep current a manual setting forth certificate holder's procedures and policies acceptable to the Administrator.
 - b. Did not test for prohibited drugs each of its employees who performs a function listed in appendix I to part 121 of this chapter in accordance with that appendix and Darby d/b/a AlphaJet's anti-drug and alcohol misuse prevention program.
 - c. Did not test for alcohol misuse persons who meet the definition of "covered employee" in appendix J to part 121 and who performed a safety-sensitive function listed in that appendix in accordance with the provisions of appendix J and Darby d/b/a AlphaJet's anti-drug and alcohol misuse prevention program.

- d. Did not prepare and keep current a written training program curriculum for each type of aircraft for each crewmember required for that type aircraft. The curriculum must include ground and flight training required by Subpart H of Part 135.
- e. Did not ensure that each crewmember was adequately trained to recognize those items classified as hazardous materials.
- f. Did not establish and maintain an approved pilot training program, and an approved flight attendant training program, that is appropriate to the operations to which each pilot and flight attendant was to be assigned, and did not ensure that they were adequately trained to meet the applicable knowledge and practical testing requirements of Part 135.
- g. Did not establish a required training program including ground and flight training curriculums for (1) initial training; (2) transition training; (3) upgrade training; (4) differences training; and (5) recurrent training.
- h. Did not ensure that each crewmember received recurrent training and was adequately trained and currently proficient for the type of aircraft and crewmember position involved.
- i. Did not have an inspection program and a program covering other maintenance, preventive maintenance, and alterations, that ensured that maintenance, preventive maintenance, and alterations performed by it, or by other persons, was performed under the certificate holder's manual.
- j. Did not establish and maintain a system for the continuing analysis and surveillance of the performance and effectiveness of its inspection program and the program covering other maintenance, preventive maintenance, and alterations and for the correction of any deficiencies in those programs, regardless of whether those programs are carried out by the certificate holder or by another person.
- k. Did not keep at its principal business office or at other places approved by the Administrator, available for inspection by the Administrator information required under this part.

1. Used pilots under Part 135, when, since the beginning of the 12th calendar month before that service, that pilot had not passed a written or oral test, given by the Administrator or an authorized check pilot, on the pilot's knowledge of the specified areas.
 - m. Used pilots under Part 135, when, since the beginning of the 12th calendar month before that service, that pilot had not passed a competency check given by the Administrator or an authorized check pilot in that class of aircraft.
 - n. Used persons as crewmembers in operations under Part 135 when each crewmember had not completed the appropriate initial or recurrent training phase of the training program appropriate to the type of operation in which the crewmember was to serve since the beginning of the 12th calendar month before that service.
 - o. Used unqualified flight check airmen to administer flight checks to pilots.
14. By virtue of Darby d/b/a AlphaJet causing, permitting, or allowing Platinum to operate passenger-carrying flights for compensation or hire when Platinum did not hold an Air Carrier Certificate and appropriate operations specifications, and by virtue of Darby d/b/a AlphaJet failing to maintain responsibility for operational control of its flight operations, Darby d/b/a AlphaJet conducted operations in violation of its Air Carrier Certificate and its operations specifications.
15. Darby d/b/a AlphaJet, by selling, assigning, transferring, and/or leasing its Air Carrier Certificate to Platinum and relinquishing operational control of flights purportedly conducted under its Air Carrier Certificate to Platinum, has abrogated its obligation under 14 C.F.R. section 135.77 to be responsible for the operational control of flights conducted under its Air Carrier Certificate.
16. Darby d/b/a AlphaJet, by selling, assigning, transferring, and/or leasing its Air Carrier Certificate to Platinum and relinquishing operational control of flights purportedly conducted under its Air Carrier Certificate to Platinum, has abrogated its obligation under 49 U.S.C. section 44702(b)(1)(A) to

provide air carrier service with the highest possible degree of safety in the public interest.

The complaint alleged that Darby had violated 14 C.F.R. sections 119.5(g) and 135.77,² and further stated that by reason of the above, it appeared to the Administrator that Darby may no longer be qualified to exercise the privileges of its certificate and that safety in air commerce or air transportation and the public interest required the indefinite suspension of its certificate, "until such time as Darby ... demonstrates to the satisfaction of the FAA that it has not surrendered operational control," of its certificate.

Darby filed a pre-trial petition challenging the Administrator's emergency determination, which was denied by Chief Administrative Law Judge William E. Fowler, Jr., in an order dated April 4, 2005. Judge Fowler concluded that,

The threat to public safety represented by the allegations set forth in the Administrator's order in this matter [which, for purposes of the emergency challenge, were assumed to be true] is plainly obvious and serious. By allegedly enabling Platinum Jet to conduct Part 135 passenger-carrying operations for compensation or hire under the authority of its air carrier certificate and operations specifications, without exercising the requisite operational control over those flights, respondent Darby effectively permitted Platinum Jet to conduct such operations without the scrutiny that is meant to assure the safe

² Section 119.5(g) states, in pertinent part, that, "no person may operate as a direct air carrier or as a commercial operator without, or in violation of, an appropriate certificate and appropriate operations specifications." Section 135.77 states that, "each certificate holder is responsible for operational control and shall list, in the manual required by § 135.21, the name and title of each person authorized by it to exercise operational control."

operation of passenger-carrying flights conducted under FAR Part 135 that would have existed had Platinum Jet been a certificated entity with its own operations specifications, directly accountable to the FAA.

Regarding Darby's assertions that the FAA's Birmingham, Alabama, Flight Standard's District Office (FDSO) had full knowledge of its agreement with Platinum, Judge Fowler noted that, "even if the Birmingham FSDO were not troubled by respondent Darby's charter arrangements prior to the February 2, 2005 incident, the investigation triggered thereby may have uncovered information previously unknown to FAA personnel, which cast respondent's arrangement with Platinum Jet in a more pernicious light."

Finally, Judge Fowler addressed Darby's contention that the indefinite nature of the emergency suspension, "creates a situation in which it is impossible ... to prevail before the NTSB since the FAA can win by merely stating that it is not 'satisfied.'" He noted that the emergency suspension of Darby's certificate, "is not dissimilar to an indefinite suspension of a pilot certificate pending the pilot's demonstration, to the Administrator's satisfaction, of flight proficiency after the pilot's competence has reasonably been brought into question..."³

³ Section 44709(a) authorizes the Administrator of the FAA to reinspect at any time a civil aircraft, aircraft engine, propeller, appliance, design organization, production certificate holder, air navigation facility, or air agency, or reexamine an airman holding a certificate issued under 49 U.S.C. § 44703.

Summary of the evidence

The November 17, 2005, charter management agreement between Darby and Platinum covering the accident airplane (which Platinum leased in August 2003 from a third party owner for the purpose of operating it in Part 135 flights under the agreement with Darby), specified that Darby would be Platinum's "exclusive agent" for on-demand Part 135 operations using that airplane, and granting Darby "sole operational control" of such operations.⁴ See Exhibit A-1. The agreement specified that Platinum would provide flight crews, pay for flight crew training, provide aircraft liability insurance, provide and pay for aircraft maintenance, and provide Darby with monthly flight summaries. In return, the agreement provided that Darby was to receive a \$2,000 monthly "certificate fee" (regardless of how many flights were conducted during the month); be responsible for assuring that flight crewmembers were properly trained; provide backup crews at Platinum's expense; and provide any other duties or services associated with the operation and management of the aircraft under Part 135 and incur associated financial obligations on behalf of Platinum, but only with Platinum's prior consent.

Additional provisions in the agreement addressed Darby's right to promote and charter the aircraft and reimburse Platinum 90% of the hourly rate charged for such a charter. However, it

⁴ Darby and Platinum apparently entered into several charter management agreements, each one covering a different airplane. Only one of the agreements (the one covering the accident airplane) was offered into evidence in this case.

was established at the hearing that Darby never generated a charter during the 15-month period of time the agreement was in effect and, therefore, these provisions were never applicable. In other words, Platinum received 100% of the revenue for all the charter flights conducted pursuant to the agreement.

The flight that crashed at Teterboro on February 2, 2005,⁵ had been chartered by a corporate customer through a charter broker that routinely arranged on-demand charter flights for that customer as well as for others. The broker's agent who arranged the February 2 charter flight testified that he understood Platinum to be a legal charter operator, and that as a routine matter he provided customers with a copy of the operator's certificate of insurance which, in the case of the February 2 flight, identified the charter operator as Platinum. Platinum officials conceded that the February 2 flight was an on-demand charter subject to the rules of Part 135. The pilots originally assigned to the flight notified a Platinum official the day before that they would not be able to take the flight because of duty time limitations, which are applicable to Part 135, but not Part 91, operations. Therefore, this crew (apparently unlike the accident crew) understood that the flight was a Part 135 flight. According to Platinum officials, due to a miscommunication, a

⁵ As a separate matter, the Safety Board is investigating the facts and circumstances of this accident for the purpose of determining the probable cause of the accident and issuing safety recommendations, if necessary. However, we note that our review and evaluation of this case is isolated from the accident investigation. That is, our decision is based exclusively on the record in this case.

pilot who had not yet been qualified to serve in Darby's Part 135 operations was assigned as the replacement captain for the accident flight. Darby was apparently not made aware of this crewmember assignment until after the accident, because no pre-departure flight manifest (listing the crew, passengers, and itinerary) was transmitted by Platinum to Darby in accordance with the procedure Platinum and Darby had agreed to.

This transmittal procedure (which called for Platinum to fax to Darby a manifest for Part 135 and Part 91 flights, and a weight and balance calculation for Part 135 flights prior to departure) was not documented in the charter management agreement between Platinum and Darby or in Darby's General Operations Manual. However, the procedure was described in a separate, undated, document (Exhibit R-5), which was apparently prepared by Darby and signed by Platinum's president. In addition, Platinum's manifest form stated at the bottom: "fax to Alphajet at [telephone number]." Platinum and Darby officials apparently regarded the faxing of this manifest and weight and balance information prior to a flight, as the equivalent of receiving permission or authorization for the flight. However, both parties indicated that no action to indicate approval was expected from Darby - rather the absence of an objection from Darby was deemed to constitute approval. Darby's Director of Operations acknowledged that Darby had never disapproved a flight in response to a faxed preflight flight manifest. But he stated

that he had on occasion asked for maintenance documentation.⁶

The first officer on the February 2 flight testified that the reason he did not fax a flight manifest to Darby was because he believed the flight was being conducted under Part 91, not Part 135.⁷ His asserted reason for this belief was the fact that the captain on the flight had not yet received Darby's Part 135 indoctrination training and, therefore, was only authorized to pilot Part 91 flights.⁸

FAA Inspector Kenneth Symons, of the Teterboro, New Jersey, FSDO, testified that he reviewed the documents supplied by Platinum and Darby in connection with the FAA's investigation and found that Platinum had booked all the Part 135 flights, had received payments for those flights, and did all the flight planning for those flights. Platinum kept the pilot training records, pay records, and drug testing records. He found that Darby had only summary pilot training information that lacked sufficient detail to determine whether the pilots had received all the training required by Darby's manual. Darby reported it

⁶ We note that the need for such an inquiry seems to suggest that Darby lacked some degree of operational control, in that it kept insufficient maintenance documentation at its facility to determine the airworthiness of the aircraft prior to departure.

⁷ The first officer's assertion that he never prepared and faxed manifests to Darby when he served on Part 91 flights was contradicted by the existence of several such manifests for what the manifests denoted as Part 91 flights, apparently prepared by him. See Exhibit A-2B.

⁸ Platinum's president testified that the captain told him after the accident he was also under the impression that the flight was being operated under Part 91 because he knew he was not yet qualified to serve on Part 135 flights.

had no information at all about the accident captain, but that this was because the captain had not yet completed Darby's pilot indoctrination training.⁹ Inspector Symons testified that the only records on this pilot were found at Platinum. Further he found no records on flight attendant training, nor were there even any provisions in Darby's manuals addressing the use of flight attendants, even though they (referred to as "cabin service representatives") were apparently used on most Platinum flights and were listed on the manifests along with the flight crew.¹⁰

With regard to airplane maintenance, Inspector Symons testified that he found that detailed records for the Challenger airplanes covered by the charter management agreements were located at Platinum's facility (in Ft. Lauderdale, Florida), and not at Darby's facility (in Muscle Shoals, Alabama). He found no

⁹ We note that Exhibit A-2B contains four manifests apparently faxed from Platinum to Darby bearing the accident captain's name as a crewmember. These flights (on January 23, January 24, and two on January 27) were identified on the manifests as Part 91 flights, but Inspector Symons testified that he found the January 24 flight had been booked through a charter company broker and was in fact a Part 135 flight. This finding is consistent with the fact that the sole passenger listed on the January 24 flight manifest was listed on several passenger manifests for previous Part 135 flights in the same airplane (but that were not piloted by the accident captain). See Exhibit A-2A. In light of this anomaly, Darby might have had sufficient reason to question Platinum's classification of this flight as Part 91.

¹⁰ In this regard, we note that Darby argues that because flight attendants were not required for the subject flights, no flight attendant training was required. However, the FAA argued that under section 135.341, a carrier that uses flight attendants must provide them with adequate training, even if flight attendants are not required for the particular operation.

evidence that Darby had reviewed the training and qualifications of the contract maintenance personnel used by Platinum to maintain the airplanes covered by the agreements. Nor were those personnel listed in Darby's operations specifications or manuals, as required by Part 135 regulations. Platinum's president asserted that its maintenance personnel were trained as specified by Darby, and that advance permission for maintenance was granted to Platinum by Darby's director of maintenance. However, no documentary evidence was offered to support these assertions.

Another FAA inspector who examined Platinum's maintenance records confirmed that certain information such as airframe and engine times was provided to Darby, but that detailed maintenance records such as inspections and work cards were maintained at Platinum's, and not Darby's, facility. He noted that the Platinum maintenance employee who signed returns to service had been designated by Darby as authorized to perform required inspection items, but he found no evidence that this employee, or any other maintenance employee used by Platinum, had been trained in how to comply with Darby's maintenance program. He further found that several maintenance contractors Platinum was using to perform maintenance on the aircraft that were used for the Part 135 flights were not listed as authorized providers in Darby's manual. He expressed concern over how Darby could exercise proper oversight of its maintenance program under these conditions.

Darby presented testimony from several FAA personnel from

the Birmingham FSDO, including Darby's principal operations inspector, indicating that they had reviewed and approved the charter management agreement between Platinum and Darby.¹¹ Platinum's president testified that before the charter management agreement could be implemented, the FAA added Platinum's aircraft to Darby's operations specifications, questioned Platinum officials, and required a "proving run." A supervisory aviation safety inspector from the Birmingham FSDO testified that Darby was found to have met the standards for operational control during pre-accident inspections of its facility. Nonetheless, Inspector Symons testified that, in his opinion, the evidence indicated that Darby had surrendered operational control of the flights here at issue to Platinum. Yet no Platinum personnel were listed in Darby's operations manual as authorized to exercise operational control.

Platinum's president and CEO testified that, because of the amount of work involved in obtaining certification and monitoring a Part 135 operation, Platinum decided that instead of obtaining its own certificate, it would operate "under" another company's certificate. He testified that charter management agreements such as the one Platinum had with Darby are common.

¹¹ Darby's counsel asserted, and FAA counsel did not directly deny, that there were differences of opinion within the FAA as to the propriety of Darby's contractual arrangement with Platinum.

The law judge's decision and arguments on appeal

The law judge found that the February 2 flight was unquestionably a Part 135 flight, but that the flight was not conducted under Darby's certificate because Platinum did not follow the appropriate procedures to notify Darby and Darby was unaware of the flight. Accordingly, he found that, "even though it was a 135 flight, it can't be ... set at the feet of this 135 certificate. It was an illegal 135 flight by Platinum." The law judge found especially compelling the language in FAA Order 8400.10 stating that the issue of operational control is to be evaluated during a "base inspection." He noted that the Administrator's witnesses acknowledged that each of the factors discussed as being relevant to operational control (such as who pays the pilots and who provides the maintenance) would not, standing alone, necessarily indicate an operational control problem. The law judge found it problematic that, despite this, "without a base inspection the Teterboro FSDO has arrived at the conclusion that there [are] operational control problems." Accordingly, he reversed the emergency order.

On appeal, the Administrator asserts that the standard of review in this case should be the same one we apply in cases where a pilot's certificate is indefinitely suspended pending a re-examination request pursuant to 49 U.S.C. 44709(a). In such cases, the Administrator is not required to prove regulatory violations by a preponderance of the evidence. Rather, the Administrator need only show that the respondent has

been involved in an incident or matter that raises a question over its qualifications to hold its certificate, without regard to the likelihood that lack of competence played a role in the incident.¹² The Administrator argues that, in light of the evidence indicating that Darby gave up operational control of its flights to Platinum, such a question has been raised.

The Administrator also argues that the law judge's finding that the February 2 flight was conducted under Part 135 should have compelled him to find that Darby was responsible for that flight. In this regard, the Administrator contends that Darby's responsibility to exercise operational control over the airplanes listed on its operations specifications during flights under Part 135 is non-delegable. The Administrator argues that Darby's lack of knowledge, rather than exempting it from responsibility, underscores its neglect in maintaining operational control. In this regard, the Administrator cites the following statement of public policy against allowing a carrier to delegate or contract away its responsibility for regulatory compliance, articulated in the FAA's published decision assessing a civil penalty, In the Matter of: Alaska Airlines, Inc., FAA Order No. 2004-8 (2004):

A holding that lack of knowledge alone exempts air carriers from responsibility could provide air carriers with incentive to look the other way and avoid all knowledge....As stated repeatedly in the past, the FAA must not permit air carriers to transfer away their critical statutory duty to provide service with the highest possible degree of safety in the public interest.

¹² The Administrator cites Administrator v. Hutchins, NTSB Order No. EA-4899 (2001), and cases cited therein.

In its reply brief, Darby argues that when two FSDO's disagree, "the view of the supervising FSDO [in this case the Birmingham FSDO] must prevail." Darby has attached to its brief what it describes as newly-discovered evidence that shows the FAA is "currently grappling with the issue" and argues that Darby's certificate should not be suspended, "while the FAA tries to figure out what its position should be." The newly-discovered evidence consists of: (1) an internet article dated April 26, 2005, by Aviation International News, reporting that the FAA is seeking to answer the question of who has operational control of brokered flights and flights involving noncertificated entities that provide pilots and aircraft to certificated Part 135 operators who in turn place those aircraft on their operations specifications; and (2) what appears to be an email from FAA headquarters seeking information from FSDOs about contractual arrangements between certificated Part 135 operators and non-certificated entities, "in order to assess the number, impact, and appropriateness of such arrangements."¹³

¹³ The Administrator has filed a motion to strike this material from Darby's brief, arguing that Darby has not explained why it could not have discovered this information earlier. However, the Administrator does not contend that there was any public reference to this information prior to the hearing, and does not dispute the accuracy of the information contained in the news report or the email. Accordingly, we will deny the motion to strike and accept the information. The Administrator has also moved to strike several other statements from Darby's brief as inaccurate, misleading, or otherwise inappropriate. Regardless of whether the Administrator's characterization is correct, we see no need to strike any of the challenged material from the brief.

Darby also contends that it maintained operational control of the flights conducted pursuant to its agreement with Platinum, and that the illegal Part 135 flight on February 2 did not violate its operating certificate or operations specifications, arguing that its agreement with Platinum did not make Darby responsible every time Platinum operated the aircraft. Finally, Darby asserts it is inappropriate for the Administrator to cite Administrator v. Air Maryland, 6 NTSB 1157 (1989), on the issue of operational control, because a companion case (Administrator v. Broderdorf, 7 NTSB 1040 (1991)) was remanded by the United States Court of Appeals for the D.C. Circuit, and the Board subsequently vacated its decision in that case.

The National Air Transportation Association (NATA) and the National Business Aviation Association (NBAA) have asked for leave to file their amicus curiae brief in this case pursuant to 49 C.F.R. 821.9(b).¹⁴ NATA and NBAA state that their members have a substantial interest in the outcome of this case because numerous members participate in charter management agreements. NATA and NBAA argue that the operational control issues in this case should be analyzed in the context of safety, not business structure. Specifically, they urge that our decision in this case be based on Darby's processes for maintaining operational control and not merely on the contractual arrangement it had with Platinum. The Administrator filed an opposition to the proffered

¹⁴ Section 821.9(b) permits amicus briefs if, in the opinion of the General Counsel, the brief will not unduly broaden the matters at issue or prejudice any party to the proceeding.

amicus brief, but also submitted a reply to the amicus brief and asked that it be considered in the event that the amicus brief was accepted. Because in our judgment the amicus brief does not unduly broaden the matters at issue or prejudice either party, both it and the Administrator's reply brief are accepted.

Discussion

According to 14 C.F.R. § 1.1, "operational control" means the exercise of authority over initiating, conducting or terminating a flight. FAA's Order 8400.10, *Air Transportation Operations Inspector's Handbook*, in Chapter 6, titled *Operational Control*, states (in paragraph 1145 B.(1)) that operators exercise operational control by making those decisions and performing those actions on a daily basis that are necessary to operate flights safely and in compliance with the regulations, and lists the following general operational control functions: crew and aircraft scheduling; accepting charter flights from the public; reviewing weather and notices to airmen (NOTAM); and flight planning. Additional, specific operational control functions listed in paragraph 1145 C include:

- a. Ensuring that only those operations authorized by the operations specifications are conducted;
- b. Ensuring that only crew members trained and qualified in accordance with the applicable regulations are assigned to conduct a flight;
- c. Ensuring that crew members are in compliance with flight and duty time requirements when departing on a flight;
- d. Designating a pilot-in-command for each flight;

- e. Providing the pilot-in-command and other personnel who perform operational control functions with access to the necessary information for the safe conduct of the flight (such as weather, NOTAMs, and airport analysis);
- f. Specifying the conditions under which a flight may be dispatched or released (weather minimums, flight planning, airworthiness of aircraft, aircraft loading, and fuel requirements);
- g. Ensuring that each flight has complied with the conditions specified for release before it is allowed to depart;
- h. Ensuring that when the conditions specified for a flight's release cannot be met, the flight is either cancelled, delayed, re-routed, or diverted;
- i. Monitoring the progress of each flight and initiating timely actions when the flight cannot be completed as planned, including diverting or terminating a flight.

Applying this guidance to the evidence in this case, it is apparent that Darby failed to maintain operational control. (Unlike the law judge, we believe that this determination can be reached on the basis of the evidence in this record, without the need for a base inspection.) As discussed above, Platinum, not Darby, controlled the initiation, conduct, and termination of each individual flight listed in the emergency order, including the accident flight. The evidence does not show that Darby gave any meaningful authorization for Platinum to conduct these flights. Rather, it appears that Darby simply received a fax notification of the flights, and that Darby never disapproved a flight. Further, as discussed above, the evidence shows that Platinum controlled crew and aircraft scheduling, accepted

charter flights from the public, and handled the flight planning. In addition, the evidence shows that Platinum, not Darby, exercised many of the specific operational control functions listed in paragraph 1145 C. For example, Platinum designated the pilot-in-command for each flight and specified the conditions under which a flight could be released, such as weather minimums, flight planning, airworthiness of aircraft,¹⁵ aircraft loading and fuel requirements. Each of these functions that Platinum performed represents areas in which Darby surrendered operational control.

In our view, Darby's lack of awareness of the February 2 accident flight illustrates, rather than absolves, Darby's failure to maintain operational control. Darby concedes that it was supposed to have, "sole operational control of the aircraft ... whenever the aircraft was to be operated for on-demand Part 135 operations." (Respondent's Reply Brief at 5.) There appears to be no dispute that the February 2 flight was an on-demand Part 135 operation.¹⁶ Accordingly, it is difficult to escape the logical conclusion that Darby was supposed to be exercising operational control of that flight, which we find it clearly did

¹⁵ As discussed above, the contract maintenance personnel used by Platinum were not listed in Darby's operations specifications, as required, nor was there any documentary evidence that maintenance personnel used by Platinum had been trained in Darby's maintenance program, or that Darby had reviewed their qualifications.

¹⁶ Although some witnesses at the hearing indicated they thought the flight was a Part 91 flight, the law judge found it was unquestionably a Part 135 flight. Neither party has appealed from this finding.

not do. The independent manner in which Darby and the Birmingham FSDO had been allowing Platinum to operate flights under authority of its certificate enabled such lapses in notification to occur.

Thus, when all of the factors discussed above are considered in combination, it appears that Darby may have had operational control of Platinum's flights in name only. We find that the preponderance of the evidence establishes that Darby surrendered to Platinum operational control over the charter flights here at issue. We need not rely on Air Maryland, or any other case, to reach this conclusion. Nor, in light of our finding that this conclusion is supported by a preponderance of the evidence, do we need to reach the question of whether a less stringent standard of proof (such as the one that governs our review of airman re-examination requests) would be sufficient.

We wish to emphasize that our conclusion is not based solely on the language in the agreement, but on the manner in which that agreement was carried out.¹⁷ This decision is not intended to be a broad indictment of all such agreements and takes no position as to whether charter management agreements in general are appropriate.

The Birmingham FSDO's knowledge and approval of the charter management agreement does not preclude the Administrator from

¹⁷ We have previously recognized that the matter of operational control is not dependent upon the wording of an agreement, but upon all of the indicia of operational control that surround any flight. Administrator v. Dade Helicopter Jet Services, Inc., 6 NTSB 374 (1988).

taking a different position. In a large organization such as the FAA there will inevitably be differing views. We disagree with Darby's assertion that the Birmingham FSDO's view should prevail in this case. The Administrator can, and indeed should, overrule a FSDO's position if she believes it is incorrect or may be inconsistent with safety. Nor should the fact that the FAA may still be evaluating broader overall questions of the number, impact and appropriateness of such arrangements preclude it from taking action in an individual case that presents immediate safety concerns.

Finally, we wish to emphasize that we do not view this indefinite suspension of Darby's certificate (until such time as it demonstrates to the satisfaction of the FAA that it has not surrendered operational control of its certificate) as a de facto revocation action, and we trust the FAA is not treating it as such. The FAA's emergency suspension is seemingly based on the premise that more information is needed to properly evaluate and consider whether Darby can continue to operate without impermissibly relinquishing operational control. Despite our agreement with the FAA that sufficient evidence exists on this record to conclude that Darby has done so, we assume that the FAA will nonetheless provide Darby with an opportunity to demonstrate that it can operate future Part 135 flights without impermissibly giving up operational control. Further, in light of the Birmingham FSDO's acquiescence in Darby's current operational profile, we think that the FAA has a heightened obligation to co-

operate with Darby in attempting to restructure its operations so as to satisfy the FAA that it can maintain operational control.

In sum, we assume the FAA will engage in, and Darby will cooperate with, a good faith effort to make a final determination of Darby's qualifications to continue operating. Such an approach would be consistent with FAA counsel's response to the law judge when he questioned what Darby could do to satisfy the FAA. In reply, counsel explained,

what we want to know is did they control their operations and using criteria that are discussed, like I say in the regulations and the handbook. I mean, the handbook would guide the inspectors.¹⁸ This is not just a willy-nilly impossible to reach kind of threshold showing. It's really not that at all.

Based on the entire record in this case, we conclude that the Administrator has supported the emergency suspension of Darby's certificate.

ACCORDINGLY, IT IS ORDERED THAT:

1. The law judge's initial decision is reversed; and
2. The Administrator's emergency order of suspension is affirmed, insofar as it is consistent with this decision and order.

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS, HEALING, and HERSMAN, Members of the Board, concurred in the above opinion and order.

¹⁸ We note that criteria for evaluating a Part 135 operator's operational control functions are discussed in FAA Order 8400.10, *Air Transportation Operations Inspector's Handbook*, Section 18, *Operational Control Inspections*.